



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R4-OAR-2022-0225; FRL-9912-01-R4]

Air Plan Approval; Kentucky; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the Kentucky Energy and Environment Cabinet (Cabinet), on November 17, 2016, on behalf of the Commonwealth of Kentucky (Commonwealth). The revision was submitted in response to the EPA's SIP call published on June 12, 2015, concerning excess emissions during startup, shutdown, and malfunction (SSM) events. The submittal requests the revision of provisions identified in the 2015 SIP call for the Kentucky SIP. EPA is proposing to approve the SIP revision and proposing to determine that such SIP revision corrects the deficiencies identified in the June 12, 2015 SIP call.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R4-OAR-2022-0225 at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. EPA may publish any comment received to its public docket. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file

sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: Estelle Bae, Air Permitting Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Ms. Bae can be reached by telephone at (404) 562-9143 or via electronic mail at bae.estelle@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On February 22, 2013, the EPA issued a Federal Register notice of proposed rulemaking (NPRM) outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.¹ For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a United States Court of Appeals for the District of Columbia Circuit decision that determined the CAA precludes authority of EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate. *See* 79 FR 55920 (September 17, 2014).

¹ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,” hereinafter referred to as the “2015 SSM SIP Action.” *See* 80 FR 33839 (June 12, 2015). The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 States, including Kentucky, were substantially inadequate to meet CAA requirements and issued a SIP call to those States to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected States had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.² Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific State SIP provisions that were substantially inadequate to meet the requirements of the Act.” Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Kentucky in 2015. The 2020 Memorandum did, however, indicate EPA’s intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA’s Deputy Administrator withdrew the 2020 Memorandum and announced EPA’s return to the policy articulated in the 2015 SSM SIP Action (2021

² October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

Memorandum).³ As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.⁴ The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum regarding EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the Agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

With regard to the Kentucky SIP, in the 2015 SSM SIP Action, EPA determined that 401 Kentucky Administrative Regulations (KAR) 50:055 section 1(1) was substantially inadequate to meet CAA requirements. *See* 80 FR 33839, 33963 (June 12, 2015). This provision states, "Emissions which, due to shutdown or malfunctions, temporarily exceed the standard set forth by the cabinet shall be deemed in violation of such standards unless the requirements of this section are satisfied and the determinations specified in subsection (4) of this section are made." The rationale underlying EPA's determination that 401 KAR 50:055 section 1(1) is substantially inadequate to meet CAA requirements, and therefore should be included in the 2015 SIP call to remedy the deficiency, is detailed in the 2015 SSM SIP Action and the accompanying proposals.

Kentucky submitted a SIP revision on November 17, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. In its submission, Kentucky is requesting that EPA revise the Kentucky SIP by removing 401 KAR 50:055 section 1(1) and section 1(4) in their entirety

³ September 30, 2021, memorandum "Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy," from Janet McCabe, Deputy Administrator.

⁴ *See* 80 FR 33839, 33985.

from the Kentucky SIP and retaining the remaining regulatory provisions, as approved on May 4, 1989.⁵

II. Analysis of Kentucky's SIP Submission

Kentucky's November 17, 2016, SIP revision requests that EPA remove two provisions in their entirety from the SIP. First, Kentucky is requesting that EPA remove the SIP-called provision, 401 KAR 50:055 section 1(1), from the SIP as discussed above. Second, the Commonwealth is also requesting that EPA remove 401 KAR 50:055 section 1(4) from the Kentucky SIP. This provision states the following:

- (4) A source shall be relieved from compliance with the standards set forth by the cabinet if the director determines, upon a showing by the owner or operator of the source, that:
 - (a) The malfunction or shutdown and ensuing start-up did not result from the failure by the owner or operator of the source to operate and maintain properly the equipment;
 - (b) All reasonable steps were taken to correct, as expeditiously as practicable, the conditions causing the emissions to exceed the standards, including the use of off shift labor and overtime if necessary;
 - (c) All reasonable steps were taken to minimize the emissions and their effect on air quality resulting from the occurrence;
 - (d) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
 - (e) The malfunction or shutdown and ensuing start-up was not caused entirely or in part by poor maintenance, careless operation or any other preventable upset conditions or equipment breakdown.

⁵ See 54 FR 19169 (May 4, 1989).

Although EPA did not include 401 KAR 50:055 section 1(4) in the SIP call with the 2015 SSM SIP Action, the provision is referenced within the SIP-called provision, 401 KAR 50:055 section 1(1), and removing it from the SIP is consistent with the 2015 SSM SIP Action. Kentucky's submittal states that 401 KAR 50:055 section 1(1) and section 1(4) will remain in the Commonwealth's regulations to be enforceable as state-only provisions.⁶

Based on Kentucky's request to remove 401 KAR 50:055 section 1(1) and section 1(4) from the Kentucky SIP, EPA proposes to find that Kentucky's November 17, 2016, SIP revision is consistent with CAA requirements and adequately addresses the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to the Kentucky SIP.

III. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule amended regulatory text that includes incorporation by reference. EPA is proposing to remove the incorporation by reference of specific provisions under 401 KAR 50:055, *General Compliance Requirements*. Specifically, EPA is proposing the removal of 401 KAR 50:055 section 1(1) and section 1(4) from the Kentucky SIP, which is incorporated by reference in accordance with requirements of 1 CFR 51.5. EPA has made, and will continue to make, the SIP generally available at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Proposed Action

EPA is proposing to approve the Commonwealth's November 17, 2016, SIP submission requesting removal of 401 KAR 50:055 section 1(1) and section 1(4) from the Kentucky SIP. EPA is proposing approval of the SIP revision because the Agency has determined that it is consistent with the requirements for SIP provisions under the CAA. EPA is further proposing to

⁶ Once removed from the SIP, 401 KAR 50:055 sections 1(1) and 1(4) will apply to Kentucky in exercising its enforcement authority for state-law purposes only. Citizens and EPA may seek injunctive relief or civil penalties for excess emissions, as 401 KAR 50:055 sections 1(1) and 1(4) will not be in the Kentucky SIP.

determine that such SIP revision corrects the deficiencies identified in the June 12, 2015 SIP call. EPA is not reopening the 2015 SSM SIP Action and is taking comment only on whether this SIP revision is consistent with CAA requirements and whether it addresses the substantial inadequacy in the specific Kentucky SIP provision (401 KAR 50:055 section 1(1)) identified in the 2015 SSM SIP Action.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. This action merely proposes to approve State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, this rulemaking does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 31, 2022.

Daniel Blackman,
Regional Administrator,
Region 4.

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